U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 14, 2016

BY ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

During her opening statement, counsel for defendant Gary Hirst misled the jury by explicitly arguing that Hirst, and no one else, faced charges in connection with the alleged criminal conduct in the Indictment. That argument was demonstrably misleading because, of course, the Government has in fact charged at least six other people for the criminal conduct alleged in the Indictment, and five of them have acknowledged their guilt. Although the Court immediately gave a curative instruction following the conclusion of Hirst's counsel's argument, that instruction alone is insufficient to cure the prejudice that arises from defense counsel's demonstrably false assertion that Hirst alone is facing charges in connection with this matter. The Government respectfully requests, under the doctrine of curative admissibility, that the Court allow the Government to elicit through witness testimony the fact that at least six other people have been charged for the conduct alleged in the Indictment, the identity of those persons, and the fact that five of them have pled guilty. By her highly misleading argument, Hirst's counsel has opened to the door to such testimony; without such testimony, the Government will have no means to rebut the misleading assertion that has been placed before the jury. Any such testimony elicited by the Government can be followed by an appropriate limiting instruction to the effect that the decision of the other charged defendants to plead guilty was a personal one and should have no impact on the jury's consideration of Hirst's guilt or non-guilt.

On at least three occasions during her opening statement, Hirst's counsel made the misleading suggestion that Hirst was somehow being singled out or targeted by the Government as a result of criminal actions committed by others. Counsel first argued, "But somehow, even though all of Gerova's officers and directors knew the same thing as Gary knew and approved and ratified the transactions, at counsel table, at defense table today is only one man, our client, Gary Hirst." (Tr. 65). Of course, the reason that Hirst was the only defendant at counsel table is because the five other defendants who are not fugitives in this matter have all pled guilty. Counsel later misleadingly argued, "Gary is an innocent scapegoat. He is being unfairly blamed for the crimes of others." (Tr. 65). Of course, other people were also "blamed" for that conduct by being charged alongside Hirst in the Indictment. Finally, Hirst's counsel argued, "Gary Hirst is being unfairly blamed for the crimes of others. He is the scapegoat, the patsy, the fall guy. He is bearing the sins of Jason Galanis, the sins of Gerova." (Tr. 71). Of course, Jason Galanis, by pleading guilty in this matter is also "bearing the sins of Jason Galanis, the sins of Gerova," as are the other defendants who have pled guilty in this matter. While each of counsel's statements alone is troubling, taken together, these statements deliberately convey the firm misimpression that Hirst alone faced charges for the conduct charged in the Indictment.

"The rule of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence." *United States* v. *Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *see United States* v. *Rea*, 958 F.2d 1206, 1225 (2d Cir. 1992). The fact that the inadmissible evidence was placed before the jury in an opening statement does not take it outside the ambit of the curative admissibility doctrine. *See Weyant* v. *Okst*, 182 F.3d 902 (2d Cir. 1999) (table) ("We are unpersuaded by Okst's contention that he is entitled to a new trial on the ground that the district court admitted the evidence by misapplying to his attorney's opening statement the 'opening the door' principle."); *id.* ("The unrelated principle that statements by counsel are not evidence does not give counsel license to make improper arguments in his opening statement.") (internal citation omitted); *see also Swayze* v. *United States*, 940 F.2d 669 (9th Cir. 1999) (table) ("The 'opening the door' rule, sometimes referred to as the 'invited error' doctrine, provides that a party may present otherwise inadmissible evidence to correct a false impression left by the defendant's testimony, or to pursue an otherwise improper line of inquiry that the defendant initiated either in his opening statement or on direct examination.").

The opening statement of Hirst's counsel misleadingly suggested to the jury that no one other than Hirst has been charged for the conduct alleged in the Indictment and that, as a result, Hirst alone is facing the prospect of being held accountable criminally for that conduct. That misleading assertion, notwithstanding the Court's curative instruction, may lead the jury to improperly conclude that the Government is somehow unfairly targeting Hirst or to speculate about the Government's charging decisions in this matter. In order to rebut the false impression that may result from Hirst's evidence, the Court should allow the Government to elicit, through the testimony of a law enforcement agent, the fact that six other people were charged in connection with the conduct in the Indictment, the identity of those charged and the disposition of the cases of the other charged defendants.[1] While such evidence is in typical circumstances inadmissible, Hirst's counsel has opened the door to this otherwise inadmissible evidence by her misleading opening statement, and the Government's proposed evidence is appropriately admitted to allow the Government to rebut Hirst's counsel's misleading impression.[2] In the alternative, the

[1] The Government would also be prepared to enter into a stipulation as to these facts.

[2] Indeed, the opening statement was not the sole instance when Hirst's counsel conveyed a misleading impression to the jury. After attempting to block the testimony of Professor Arthur Laby as improper expert testimony, Hirst's counsel then tried to elicit, during cross-examination,

Government would seek to elicit, at a minimum, the fact that other individuals were charged in connection with the conduct alleged in the Indictment. After such evidence is elicited, the Government would request that the Court give an appropriate limiting instruction, akin to the limiting instruction sometimes given with respect to cooperator guilty pleas, indicating the evidence of guilty pleas by others should not be considered by the jury in determining Hirst's guilt or non-guilt.

Respectfully submitted,

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the fact that Laby was not testifying as an expert witness. (Tr. 202). Hirst's counsel was thus trying to have it both ways – arguing to the Court that Laby was an improperly noticed expert and then suggesting to the jury through his cross-examination question that Laby could somehow not qualify to testify as an expert.